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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-145

DAVID NOLAND, *et al.*,

Petitioners,

—v.—

WILLIAM R. DESOBRY, Commanding General, United States Army Armor Center, Fort Knox, Kentucky,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010

PHILIP L. GRAUMAN
Kentucky Civil Liberties Union
425 West Liberty
Louisville, Kentucky 40202

Attorneys for Petitioners

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IN THE

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OCTOBER TERM, 1972

No. .....

DAVID NOLAND, *et al.*,

Petitioners,

—v.—

WILLIAM R. DESOBRY, Commanding General, United States Army Armor Center, Fort Knox, Kentucky,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on April 24, 1972.

Opinions Below

The 2 to 1 decision of the United States Court of Appeals for the Sixth Circuit is unreported and is set forth in the Appendix, *infra* at pp. 1a-2a. The memorandum decisions of the United States District Court for the Western District of Kentucky are unreported and are set forth in the Appendix, *infra* at pp. 3a-6a, 7a-13a.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 24, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether Army Regulation 210-10, Paragraph 5-5, which establishes a system of prior restraint upon the dissemination of printed matter on military installations, is unconstitutional under the First Amendment?

2. Whether Army Regulation 210-10, Paragraph 5-5, as applied to prohibit and restrict these petitioners from distributing certain issues of their newspaper, IN FORMATION, at various points at Fort Knox, deprived them of rights under the First Amendment?

3. Whether the methods by which the petitioners were refused permission to distribute their newspaper at Fort Knox deprived them of due process of law?

Constitutional and Regulatory Provisions Involved

First Amendment; Fifth Amendment.

Department of Defense Directive Number 1325.6 (Sept. 12, 1969).

U.S. Army Regulation 210-10, paragraph 5-5.

U.S. Army Armor Center Regulation No. 210-1, para. 89.2.

Memorandum on the subject "Guidance on Dissent" by the Office of the Adjutant General.

(These regulations are set forth in the Appendix, *infra*, at pp. 14a-32a.)

Statement of the Case

In the spring of 1970, the petitioners, several enlisted men stationed at Fort Knox, Kentucky, prepared and published at their own expense a mimeographed newspaper entitled IN FORMATION, containing articles of interest to soldiers. Fort Knox is an open post, a military and civilian community of over 70,000 people (App., *infra*, p. 8a) whose commander characterized himself as "Mayor, town manager and everything else." (Irby Deposition, p. 57).

On April 5, 1970, the petitioners submitted a written request to their Commanding General seeking approval to distribute issues of IN FORMATION on Fort Knox and offering Issues 1 and 2 for examination (App., *infra*, p. 9a).[1] Their request was in conformity with the base regulation which provided:

---

[1] Issue 1 contained a statement of policy, and articles on a taxicab monopoly operating at the base, a news story in the Wall Street Journal, the uses to which post bookstore profits are put, the obituary of a soldier who died of meningitis, an anti-war advertisement, a discussion of press freedom in the military, and a request for contributions and assistance.

Issue 2 had stories about racial discrimination off base, the prospects of a volunteer army, regulations governing early termination of service, and a reprint from the New Republic. It also contained an article about the American Servicemen's Union, which was to be the primary basis for denying distribution.

89.2 *Distribution of Printed Materials.*

Distribution on the Fort Knox military reservation of publications, including pamphlets, newspapers, magazines, handbills, flyers and other printed material may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the Commanding General or his designated representative. (App., *infra*, p. 17a.)

On May 7, 1970 the Commanding General denied the request, asserting that "the dissemination of this publication presents a clear danger to the loyalty, discipline and morale of the troops of this command." No reasons or explanations were given, although the Army's memorandum, Guidance on Dissent, requires that "a commanding officer must have cogent reasons, with supporting evidence, for any denial of distribution privileges." (App., *infra*, p. 27a.) The Commanding General's action was premised upon Army Regulation 210-10, paragraph 5-5 which provides, in part, as follows:

C. *Restrictions on disseminations of publications.*

If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline or morale of troops at his installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, or properly subject to his control.

The matter was then referred up the chain of command for review of the initial determination. Even though AR

210-10 seems to require that a prompt decision will be forthcoming, several months elapsed, and no decision was received.

Consequently, having waited more than five months for a determination, the petitioners commenced the instant action. Their complaint sought declaratory and injunctive relief with regard to the regulations and the order refusing to permit distribution of Issues 1 and 2 of IN FORMATION. They also requested monetary damages. Jurisdiction was premised, *inter alia*, upon 28 U.S.C. Sections 1331 and 1361.

By letter dated November 10, 1970 petitioners were informed that the Department of the Army would permit the distribution of Issue 1 but not Issue 2 (App., *infra*, pp. 4a, 9a) (Plaintiff's Exhibit 1). No explanation was given as to why Issue 2 was improper or as to what standard was used in making the determination. The letter imposed several restrictive conditions on the distribution of IN FORMATION. The paper could be distributed on one day only, during the limited hours of 8 A.M. to 7:30 P.M., contained in boxes with one small sign reading "Free Copies—IN FORMATION" at four specified locations (Plaintiff's Exhibit 1). The conditions explicitly prohibited personal distribution of the newspaper to any personnel on the installation. (*Id.*) (App., *infra*, p. 9a).

December 12, 1970 was the date agreed upon for distribution of Issue 1. That morning petitioner Noland and two assistants went to the designated area. There they were met by a civilian officer who read to Noland from a document which restated the original conditions for distributing IN FORMATION and several others: neither Noland nor his assistants could remain "in the vicinity of the

distribution outlets," no solicitation would be permitted, and whenever the boxes were to be restocked the officer would accompany Noland to do that (Deposition of Irby, pp. 49-51). This document was not shown to the petitioner and, despite his efforts to obtain clarification of the new instructions, he was unable to get a definitive answer (T. 64-65).* Noland then abandoned his plan to generate interest in the newspaper by standing next to the boxes during distribution (T. 55-56).

Specialist Roach, one of Noland's assistants, stood outside the immediate vicinity of the distribution box, showed his copy of IN FORMATION to people whom he thought might be interested and directed them to the PX for their own free copy (T. 143-44). Roach didn't believe the Army intended to "specifically prohibit us from talking to people about the paper or point it out to them beyond that distance" (Tr. 143). Although Roach neither attracted a crowd nor encountered any "hostile reaction" (T. 146) he was arrested by the Military Police for soliciting and disorderly conduct (Tr. 146), and placed on restriction for more than a week. In addition to the arrest of Roach, there was extensive surveillance of the distribution operation, including military police being stationed at the paper's distribution points "attempting to make identifications of the people who picked them up" (T. 91).

Subsequently in March 1971 petitioner Noland requested permission to distribute Issue 5 of IN FORMATION. After first refusing to deal with petitioner "personally," the commander, in an undated letter, authorized distribution of

* "T. ....." refers to the transcript of a May 1971 hearing in the District Court.

Issue 5, but under the same strict conditions that had obtained earlier. Noland's further efforts to ease those restrictions were unsuccessful. Issue 5 was never distributed.

Against this background, the District Court considered the petitioners' claims. First, in an order dated April 13, 1971, the court granted partial summary judgment to the respondent, upholding the facial constitutionality of AR 210-10, paragraph 5-5 and USAARCR 210-1, and the validity of the administrative decision.

In approving that decision, the Court relied on an affidavit submitted by the commander, General Irby, in which he stated that the primary reason for his decision was the inclusion in Issue 2 of an article entitled "ASU Versus AUSA." The one-page article compared the goals of two organizations with opposing views, the American Servicemen's Union and the Association of the United States Army. The article described the ASU's demands, which involve advocacy of democratizing the Army. General Irby's affidavit surveyed these demands, as described in IN FORMATION, and concluded that the ASU's goals were incompatible with the proper functioning of a military installation:

> I determined further that an organization with goals such as those of the American Servicemen's Union would, if successful, impair the effectiveness of the United States Armed Forces as a means for national defense. Accordingly, because of the publicity to and advocacy of support for the American Servicemen's Union appearing in the second issue of IN FORMATION, it was my determination that to permit distribution of these publications on the installation would constitute a clear danger to military loyalty, discipline and morale. (Irby Affidavit, p. 3.)

He also concluded that the presentation of such views on the base would be met with hostility and could lead to possible incidents of violence.

Thereafter, on May 21, 1971 the District Court considered those remaining issues which had not been disposed of by motion for summary judgment. The hearing probed the possible reasons for the restrictive conditions imposed on the distribution of IN FORMATION. In deposition testimony, the Commanding General claimed that solicitation would be disruptive of the function of the installation because of the hypothetical possibility of a violent confrontation with those opposed to "any so-called underground newspaper" (Irby Deposition, p. 66). Another justification offered was that these strict conditions were necessary to ensure that only Issue 1 was placed in the distribution boxes: the boxes had to be heavily guarded, "dissipating valuable personnel resources" and limiting the time of distribution to one day (Irby Deposition, p. 72).

On June 8, 1971, the District Court dismissed petitioners' complaint. The court concluded that the restrictions on distribution were not unreasonable, that the delays in acting on the request for approval were not excessive, and that the commander's refusal to discuss the matter with Noland was acceptable (App., *infra*, pp. 11a-13a).

The Court of Appeals affirmed, relying on the decision below. Judge McCree dissented, having "grave doubts" about the validity of the regulation and of the decision to deny permission to distribute Issue 2. It is to review this judgment that petitioners seek certiorari.

Reasons for Granting the Writ

Certiorari should be granted because the court below has decided an important federal question in a manner which conflicts with decisions of this Court and of other circuits.

The relevant Army and base regulations establish a system of prior restraint which offends established First Amendment requirements and safeguards. In this particular case, the regulatory arrangement has been applied to interdict and restrict the distribution of printed matter plainly entitled to First Amendment protection. Had the mayor of a small city imposed the same restraints as did the base commander here, the result would have been clear. A contrary result should not obtain merely because a military installation is the locus of First Amendment activity.

1. *The decision below is in conflict with this Court's ruling in* Flower v. United States, —— *U.S.* ——, *40 U.S. Law Week 3585 (1972).*

In *Flower,* the petitioner was prosecuted for violating an order not to re-enter Fort Sam Houston. The bar order was imposed because the petitioner had previously distributed handbills without obtaining the prior approval required by the base regulation, which was virtually identical to the ones involved here. In a *per curiam* decision reversing the conviction, this Court declared that "[t]he base commandant can no more order petitioner off of this public street because he was distributing leaflets than could the city police order any leafleteer off of any public street." 40 U.S. Law Week at 3586.

Fort Knox, like Fort Sam Houston, is an open base, whose commandant characterized himself as the "mayor"

of a community of over 70,000 citizens, both military and civilian. And here, as in *Flower,* the commander attempted to prevent or severely restrict distribution of printed material. While the sanctions imposed were not criminal, the effective infringement of First Amendment rights was comparable. *Flower* does not allow a base commander the scope of power over First Amendment activity which the decision below has afforded.

2. *This Court should resolve the conflict among the circuits over whether, and the extent to which, base commanders may restrict the freedom of expression of soldiers and civilians.*

The present case provides an appropriate opportunity for resolving many of the conflicting holdings and implications in the numerous Courts of Appeals decisions relating to the exercise of First Amendment rights on military posts. Compare *Schneider* v. *Laird,* 453 F.2d 345 (10th Cir. 1972), *cert. denied,* 40 U.S. Law Week 3582 (June 13, 1972); *Dash* v. *Commanding General,* 429 F.2d 427 (4th Cir. 1970), *aff'd per curiam,* 307 F. Supp. 849 (D.S.C. 1969), *cert. denied,* 401 U.S. 981 (1971) and *Bridges* v. *Davis,* 443 F.2d 970 (9th Cir. 1971), *cert. denied,* 40 U.S.L.W. 3399 (1972) with *Flower* v. *United States,* 452 F.2d 80 (5th Cir. 1972), *rev'd per curiam,* 40 U.S.L.W. 3585 (June 12, 1972), and *Kiiskila* v. *Nichols,* 433 F.2d 745 (7th Cir. 1970). See also, *Yahr* v. *Resor,* 431 F.2d 690 (4th Cir. 1970), *cert. denied,* 401 U.S. 982 (1971); *United States* v. *Bradley,* 418 F.2d 688 (4th Cir. 1969); *Cortwright* v. *Resor,* 447 F.2d 245 (2d Cir. 1971), *cert. denied* 40 U.S. Law Week 3416 (1972); *Overseas Media Corp.* v. *McNamara,* 385 F.2d 308 (D.C. Cir. 1967). Presumably this Court's decision in

Flower will provide some guidance, but further clarification is required.

The decision below reflects a type of judicial deference to a generalized command discretion which results in the application of a narrower scope of review to military restrictions on free expression than is ordinarily allowable in First Amendment cases. See, e.g., *Dash* v. *Commanding General, supra.* As a consequence, in this case there was no careful attempt at close analysis of the overbreadth and vagueness of AR 210-10 paragraph 5-5, nor of the speculative grounds offered by the commanding officer in support of his belief that "advocacy of ASU demands . . . are totally incompatible with the maintenance of military loyalty, discipline and morale." Indeed, it was "with considerable trepidation" that the District Court agreed to hold a hearing at all, since, in its view, military decisions are "a field . . . into which we personally feel courts should not sail" (App., *infra,* p. 5a).

In contrast, this Court in *Flower* afforded minimal deference to command judgment and applied normal, rigorous First Amendment standards of review. Similarly the Seventh Circuit in *Kiiskila* v. *Nichols, supra* subjected the military determination to rigorous and independent judicial examination. In reversing a summary dismissal of plaintiff's challenge to her exclusion from Fort Sheridan, which had resulted from the command's discovery of anti-war literature in her car on post, the Seventh Circuit rejected the "broad claim that undefined military and national defense considerations are sufficient to permit the government to infringe plaintiff's rights to freedom of speech and association." 433 F.2d at 750. Rather, on military installations, as elsewhere, First Amendment activity may

be regulated only when "directed to inciting or producing imminent lawless action." *Id.* at 751. See also, *Yahr* v. *Resor, supra; United States* v. *Bradley, supra.*

These decisions apply a standard for judicial review of First Amendment matters more consonant with established constitutional doctrine. It is interesting that they all involved civilians exercising their right of free expression on a military installation. By contrast, *Dash* v. *Commanding General, supra, Schneider* v. *Laird, supra* and the instant case, in which only superficial scrutiny was given to the purported grounds for restraining freedom of expression, all involved military personnel.

Petitioner submits that such an implicit distinction cannot survive First Amendment analysis. The right of a soldier to distribute printed matter on an open military base should be no different than that of a civilian. The court should grant review to so hold.

3. *The decision below conflicts with controlling decisions of this Court with respect to the application of First Amendment standards in the imposition of prior restraints.*

The regulations challenged here establish a system of prior restraint which bears "a heavy presumption against its constitutional validity." *New York Times Co.* v. *United States,* 403 U.S. 713, 29 L. Ed.2d 822, 924 (1971); see also, *Healy* v. *James,* 40 U.S. Law Week 4887, 4892 (1972). The courts below failed to render the careful scrutiny which this principle requires.

The regulatory arrangement, and the manner of its application, run afoul of several First Amendment principles. First, Army Regulation 210-10 authorizes the base com-

mander to restrain the distribution of literature where "it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops" at the installation. The standard is overbroad since it fails to limit its prohibition to the narrow area of expression which may be restricted under *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969). Similarly, it is unconstitutionally vague because it is difficult to determine, for example, what constitutes a danger to "loyalty" or "morale." See *Baggett* v. *Bullitt,* 377 U.S. 360, 371 (1964).[2] Finally, the regulation lacks the type of definite standards which any licensing scheme must have. *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969).

Second, the regulatory arrangement fails to provide the careful procedural requirements and time limitations which a censorship regime must afford. See *Blount* v. *Rizzi,* 400 U.S. 410, 417 (1971); *Freedman* v. *Maryland,* 380 U.S. 51, 57, 58 (1965). Here it took almost six months before a final administrative determination was forthcoming. If principals of secondary schools must comply with such First Amendment requirements before they may attempt to restrain the on-campus distribution of publications, see, *Eisner* v. *Stamford Board of Education,* 440 F.2d 803, 810 (2d Cir. 1971), base commanders should be subject to similar limitations.

Finally, the defects in the regulatory arrangement are reflected in the fact that it authorized the suppression of this particular publication. The base commander was al-

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[2] Nor have military court decisions interpreting comparable provisions remedied the defect. See *United States* v. *Harvey,* 19 USCMA 539, 42 CMR 141 (1970); see generally, Wulf, *Commentary: A Soldier's First Amendment Rights: The Art of Formally Granting and Practically Suppressing,* 18 Wayne L. Rev. 665, 673-75.

lowed to deny distribution because IN FORMATION contained an article describing an organization's goals which, if enacted, would allegedly be detrimental to discipline. Yet absolutely no nexus between the publication and the evil to be prevented was demonstrated. The commander's views constituted no more than "mere undifferentiated fear or apprehension of disturbance" insufficient to overcome the petitioners' rights. *Healy* v. *James, supra; Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, 508 (1969).

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010

PHILIP L. GRAUMAN
Kentucky Civil Liberties Union
425 West Liberty
Louisville, Kentucky 40202

*Attorneys for Petitioners**

July 24, 1972

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* The attorneys for petitioners wish to thank Ms. June Zeitlin, a third-year student at New York University Law School, for her assistance in the preparation of this petition.

APPENDIX

Decision of the United States Court of Appeals for the Sixth Circuit

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1661

DAVID NOLAND, *et al.*,

Plaintiffs-Appellants,

—v.—

WILLIAM R. DESOBRY, Commanding General of the U.S. Army Armor Center, Fort Knox, Kentucky,

Defendant-Appellee.

Before:

EDWARDS, PECK, MCCREE,

Circuit Judges.

This case having come on to be considered on the record on appeal and on the briefs and oral arguments of counsel for the parties, and the Court, on the basis thereof and particularly on the basis of the findings of fact, conclusions of law and opinion filed by District Judge James F. Gordon having concluded that the judgment should be affirmed (*Dash* v. *Commanding General,* 307 F. Supp. 849 (D.S.C. 1969), *aff'd on opinion below,* 429 F.2d 427 (4th Cir. 1970), *cert. denied,* 401 U.S. 981 (1971)),

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

JAMES A. HIGGINS
Clerk

McCree, *Circuit Judge* (dissenting).

Because I have grave doubts about the validity of AR 210-10, ¶5-5, I would vacate the order granting partial summary judgment entered April 13, 1971, and would remand the case for a full evidentiary hearing on this issue and on the question of the validity of the decision to deny permission to distribute Vol. 1, Issue 2 of *In Formation*. *See Dash* v. *Commanding General*, 307 F. Supp. 849, 855 (D.S.C. 1969).

Order of the United States District Court Granting Partial Summary Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 6760

DAVID NOLAND, *et al.*,

Plaintiffs,

—v.—

RICHARD L. IRBY, etc.,

Defendant.

This matter comes before the Court on various motions tendered by plaintiffs and defendant. The Court having considered said motions, and being sufficiently advised, rules as follows:

(1) Defendant's motions to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted are OVERRULED. While we suspect that there may well be some merit to defendant's contention that the amount in controversy here does not exceed the sum of $10,000 as required by 28 U.S.C. §1331, it does not appear "to a legal certainty" that the claim is really for less than the jurisdictional amount. *Bell* v. *Preferred Life Assurance Society,* 320 U.S. 238 (1943). However, if at any future stage of the proceedings

it appears that plaintiffs' jurisdictional allegations have been made in bad faith, this action will be dismissed. *Emland Builders, Inc.* v. *Shea*, 359 F. 2d 927, 929-930 (10th Cir. 1966). In addition, if plaintiffs are finally adjudged to be entitled to recover less than the sum of $10,000, this Court will consider imposing costs on the plaintiffs. 28 U.S.C. §1331(b).

(2) Plaintiffs' motion for leave to file their supplemental complaint is SUSTAINED.

(3) Plaintiffs' motion for a preliminary injunction and/or a writ of mandamus is OVERRULED. *Yahr* v. *Resor*, 431 F. 2d 690 (4th Cir. 1970).

(4) Defendant's motion for summary judgment is SUSTAINED as to the constitutionality of Army Regulation 210-10, paragraph 5-5, and U. S. Army Armor Center Regulation 210-1. *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C. 1969), *aff'd*, 429 F. 2d 427 (4th Cir. 1970), *cert. denied*, No. 1163 (U. S., March 22, 1971).

(5) Defendant's motion for summary judgment is SUSTAINED as to whether Major General Irby abused his discretion in denying plaintiffs' request to distribute Volume 1, Number 2, of IN FORMATION at Fort Knox. In his affidavit General Irby states that his decision to prohibit distribution of Number 2 of IN FORMATION was based on his belief that the publication's advocacy of the demands of the American Servicemen's Union constituted a clear danger to the military loyalty, discipline, and morale of his command. We have examined the publication in question and we agree with General Irby that advocacy of such ASU demands as the right to elect officers by popular vote and the right to disobey orders to serve in Vietnam are

totally incompatible with the maintenance of military loyalty, discipline, and morale. As to such we do not believe reasonable men could differ. We therefore say that General Irby did not abuse his discretion in prohibiting publication of Number 2 of IN FORMATION.

(6) Defendant's motion for summary judgment is OVERRULED as to (a) the complaint of the restrictions placed upon the distribution of Number 1 of IN FORMATION and (b) as to General Irby's refusal to deal with plaintiff Noland regarding distribution of Number 5 of IN FORMATION. The Court is of the opinion that genuine issues as to material facts exist regarding these questions.

It is with considerable trepidation that we "set ourselves to sea" to review military decisions—a field in which we admittedly possess no expertise—and into which we personally feel courts should not sail; however, past judicial decisions of our superior brothers seem to demand such travel of us. Travel with considerable concern on our part as to the propriety thereof, to say nothing of the *appropriate standards of our review. Yahr* v. *Resor,* supra.

Accordingly, with reluctance, upon proper motion by plaintiffs, this Court will set a date for the hearing of proof as to the following:

(1) The existence or nonexistence of a basis in fact for the restrictions placed by defendant on the distribution of Volume 1, Number 1, of IN FORMATION; and,

(2) Whether the action taken by defendant with regard to refusal to deal with plaintiff Noland as to Volume 1, Number 5, of IN FORMATION was reasonable under existent circumstances.

So ordered.

April 13, 1971

James F. Gordon
United States District Judge

Copies to:

Counsel of record.

A Copy: Attest
August Winkenhofer, Jr., *Clerk*

By M. Leighton
Deputy Clerk

Final Decision of the United States District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 6760

DAVID NOLAND, *et al.*,

Plaintiffs,

—v.—

RICHARD L. IRBY, Commanding General, U. S. Army Armor Center, Fort Knox, Kentucky,

Defendant.

MEMORANDUM ORDER AND JUDGMENT

This action came on for hearing before the Court on Friday, May 21, 1971. By prior order of the Court, bearing date of April 13, 1971, the complexion of the hearing was circumscribed to two issues, viz:

(1) Whether or not a reasonable basis in fact existed for the restrictions placed by General Irby upon the distribution of Volume I, Number 1, of the newspaper In Formation; and,

(2) The reasonableness of the grounds existing for justification of the refusal of General Irby to deal with the plaintiff Noland as to the issuance of Volume I, Number 5, of the newspaper In Formation.

On hearing date, the Court in the spirit of leniency granted to the plaintiff, over the objection of the defendant, the right to raise in evidence two additional issues:

(a) The reasonableness or unreasonableness of the delay in time between the plaintiff's initial request for approval to issue and distribute Volume I, Number 1, and Volume I, Number 5, and the granting of approval therefor by military authority; and,

(b) Validity of plaintiff's assertion of denial of due process in not being afforded the opportunity of confrontation with military authority at the times such authority considers through channels his request for approval and distribution.

As to the above four issues the Court finds the following:

Findings of Fact

1. The defendant General Irby, at all times in issue, was the Commanding General of the military installation of Fort Knox, Kentucky, in that capacity holding jurisdiction and control over military and civilian personnel in the neighborhood of 73,000 persons.

2. That at the said army installation there continually exists an Armor Armed Forces training program for thousands of enlisted and officer personnel, dedicated to training in military undertakings for the defense of the nation and themselves individually.

3. That said Army Post is of large geographic size, inhabited, in addition to military personnel, by thousands of dependent family members of such personnel and visited daily as an open Post by numerous friends of such personnel and commercial suppliers and vendors.

4. That the plaintiff Noland, holder of a Masters Degree in journalism, is a member of the military establishment at Fort Knox, Kentucky, as a soldier, with Specialist rating, and has been such for some months in excess of a year.

5. That said Noland engaged himself in the private undertaking of the publication of a newspaper on said Army Post, same being called "In Formation".

6. That on or about April 5, 1970, for the first time the defendant Noland made application to military authority that he might distribute upon the military installation itself Volume I, Number 1, of his publication In Formation, and that such application was the first of its kind or nature ever received by the military establishment of said Post.

7. Upon such application being made, same was, as required by regulations, forwarded by said Irby up through Army channels to proper higher authority.

8. Subsequently, on or about November 1, 1970, said Volume I, Number 1, was approved by higher command for distribution. The distribution thereof was made subject to certain restraints placed thereon by the said Irby (specifically appearing in detail in this record, Irby's deposition beginning line 19, page 49) prescribing points of distribution and the physical manner of distribution, etc. That such were reasonable and proper restrictions, as explained by General Irby, in the accommodation of interest of all concerned.

9. That on the day or night preceding the distribution authorized for December 12, 1970, unknown to defendant Irby, the plaintiff Noland unilaterally made some eighty-odd changes in the content of the issue Volume I, Number 1, that had been submitted to the military authority and approved in original form, sans such changes.

10. That such changes appear to have been more as to appearance and grammatical correction than as to substance; nevertheless, we find such changes, by improving the appearance and readability, to have improved the paper's credibility, thereby creating additional reader appeal and interest over and above that viewed and approved by higher military authority; and that accordingly the actions of Noland were improper.

11. Subsequently, on or about March 1, 1971, plaintiff Noland made application for approval to distribute Volume I, Number 5, *which issue was at that time five months old.* Whereupon, defendant Irby, in view of Noland's prior unilateral changes in Volume I, Number 1, properly refused to deal with the plaintiff Noland as the person representative of the paper In Formation. We find such factually justified as a military disciplinary procedure against said Noland for his prior irregular unilateral actions relative to Volume I, Number 1, In Formation. However, defendant Irby did offer to deal with other persons representative of said publication, but in any event the request of Noland for Volume I, Number 5, was forwarded up through military channels from Fort Knox to higher military authority on March 12, 1971, and bore a *recommendation for approval of distribution* from General Irby. Distribution was authorized by higher authorities under the regulations on March 30, 1971.

Almost immediately subsequently thereto, General Irby received further military assignment and was succeeded by General Desobry who did offer to negotiate and deal with Specialist Noland relative to the distribution of Volume I, Number 5. By hearing date before us neither Noland nor Desobry had made any further move.

12. We are constrained to express that the credibility of this plaintiff is somewhat tremulous to us. Well educated and sophisticated; in testifying on direct Noland possessed clear and positive recollection of the most minute matters, but became uncertain and lacking of recall as to important facts and details when upon cross-examination. Such, coupled with the fact that in one instance, in particular, he played loose and careless by attempting, in his affidavit, to reflect upon the integrity of military authority by referring that an act had been taken by them in "minutes", when upon cross-examination he acknowledged such act had in fact occurred "three hours" subsequent; admittedly done to foster the impression of arbitrary action on the part of the military.

Conclusions of Law

1. Pursuant to the foregoing factual Fndings, we conclude that there was a reasonable basis in fact for the restrictions placed by General Irby on the distribution of Volume I, Number 1, of the newspaper In Formation.

Initially, it must be observed that one in the military service has no absolute right of free speech and, likewise, entry thereinto carries with it an acceptance of some abridgment upon such right. Further, military organization and obligation require a specialized community governed by more absolute, as well as different, disciplines

from those of the civilian community. Additionally, Courts are required to accommodate the demands of individual rights of those in the military service in a far different context from those encountered in the ordinary run of civilian life. *Dash* v. *Commanding General,* 307 F. Supp. 849, 429 F.2d 427, *cert. denied* 39 U.S.L.W. 3410 (March 23, 1971) and cases therein cited.

2. We hold that there was reasonable grounds existing for justification on the basis of military discipline and necessity for the refusal by General Irby to deal with the plaintiff Noland as to the issue Volume I, Number 5.

Consistent with the judicial historical hands-off attitude relative to the military, the disciplining of those under oath to obey the orders of their commanders, absent total arbitrariness, should not be disturbed by judicial authority. Chief Justice Warren in the Bill of Rights and the Military 37 New York University Law Review 181. Irby was not arbitrary but, in fact, agreed to deal with any other representative of Noland's publication and further subsequently recommended approval of Volume I, Number 1, distribution to his higher authority.

3. The claim of the plaintiff of unreasonable delay as to approval for distribution of Volume I, Number 1, and Volume I, Number 5, is without merit.

In Formation, not being a publication of "time of the essence news" but more a document dedicated to the espousing of ideological beliefs, was in no way damaged by the delay. As to Volume I, Number 1, the claim must be viewed in the light of the fact that at the time distribution of this issue arose, the question was new and novel in military circles. Army administrative procedures for

processing distribution requests had not by that time been adequately established. By the time Volume I, Number 5, was submitted for approval, Noland admits it was five months old and he performed no re-write thereof before submission. It was approved for distribution within a month. This claim of unreasonable delay to us is de minimis.

4. That the plaintiff's assertion of denial of due process in not being afforded the opportunity of confrontation with the military authority at the time of its consideration of the authorization for distribution is without merit.

The Army is not a deliberative body. In re Grimley, 137 U.S. 147.

ORDER FOR JUDGMENT

Accordingly, it is hereby ordered that the defendant have judgment and this complaint is dismissed at the plaintiff's costs.

June 8, 1971

/s/ JAMES F. GORDON
James F. Gordon
United States District Judge

Copies to:

Counsel of record

A Copy: Attest
August Winkenhofer, Jr., Clerk

By [Illegible]
Deputy Clerk

U. S. Army Regulation 210-10, Par. 5-5

ARMY REGULATION 210-10

★5-5. Protection of loyalty, discipline and morale.

a. Objectives. The maintenance of loyalty, discipline, and morale among Army troops is essential if the Army is to continue to provide a reliable and effective military force responsive to the national security missions assigned pursuant to lawful authority. At the same time, troops are generally entitled to the free access to news and publications which other citizens enjoy.

b. Responsibilities. Installation commanders will encourage and promote the availability to service personnel of books, periodicals, and other amusement media which present a wide range of viewpoints on public issues. Such media should include those emphasizing the standards of loyalty, patriotism, and discipline which are common to the armed force. However, installation commanders will not, except as provided in this paragraph, take action to control or restrict the dissemination of publications, even if such publications are believed to be in poor taste or unfairly critical of Government policies or officials. The installation commander will be guided by the principle that, except in cases in which a publication constitutes a clear danger to military loyalty, discipline, or morale, military personnel are entitled to the same free access to publications as are other citizens.

c. Restrictions on disseminations of publications. If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops

at his installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, on property subject to his control. The commander will consider whether the act of restriction will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-post sources.

d. Reports. Concurrently with imposing a delay as authorized in *c* above, the installation commander will so inform the next major commander and Headquarters, Department of the Army (Chief of Public Information, extension 74200), and request from Headquarters, Department of the Army, approval to prohibit the distribution of that publication or the particular issue thereof. Telephonic communication will be used in each instance. If the publication in question is one which is unlikely to be available at Headquarters, Department of the Army, a copy of the publication or a transcript of the text of the portion giving rise to the dissemination restriction will be forwarded to Headquarters, Department of the Army, by the fastest available means. The delay in distribution will remain in force until the decision to approve or disapprove the request is made. These reports are exempt under provisions of paragraph 7-2*a*, AR 335-15.

e. Distribution outlets. An installation commander may, in his discretion, impose a requirement that distribution of publications may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the commander or his authorized representative. The installation commander may, without informing higher headquarters or Department of the Army

in advance, take appropriate action to prevent the distribution of publications by persons who have not obtained the required approval. Except where the publication in question is published primarily for advertising or promotional purposes, a denial of a request for permission to distribute a publication will be reported as required in *d* above.

Fort Knox Regulation on Distribution of Printed Material

USAARMC Reg 210-1
C 8

HEADQUARTERS US ARMY ARMOR CENTER
Fort Knox, Kentucky 40121

Change
No. 8

16 September 1969

INSTALLATIONS

Post Regulation

USAARMC REGULATION NO. 210-1, 30 April 1966, is changed as follows:

Page 32. Paragraph 89.2 is added.

89.2. *Distribution of Printed Material.* Distribution on the Fort Knox military reservation of publications, including pamphlets, newspapers, magazines, handbills, flyers, and other printed material may not be made except through regularly established and approved distribution outlets, unless prior approval is obtained from the Commanding General or his designated representative.

FOR THE COMMANDER: (AHBAJA)

OFFICIAL:

JACK L. BALTHIS
Colonel, GS
Chief of Staff

THOMAS W. KEITT

THOMAS W. KEITT
Colonel, AGC
Adjutant General

DISTRIBUTION:
A

Department of Defense Regulation No. 1325.6

September 12, 1969
NUMBER 1325.6
ASD (M&RA)

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces

References: (a) U. S. Constitution, First Amendment

(b) Title 50, U. S. Code Appendix, Section 462

(c) Title 18, U. S. Code, Sections 1381, 2387, 2385, 2388

(d) Title 10, U. S. Code, Chapter 47 (Uniform Code of Military Justice)

(e) DoD Directive 1334.1, "Wearing of the Uniform," August 11, 1969

I. *PURPOSE AND APPLICABILITY*

This Directive provides general guidance governing the handling of dissident activities by members on active duty of the Army, Navy, Air Force, and Marine Corps. Specific problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with the provisions of applicable Department regulations and the Uniform Code of Military Justice.

II. *POLICY*

It is the mission of the Department of Defense to safeguard the security of the United States. The service member's right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security. On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. The proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible Commander.

III. *SPECIFIC GUIDELINES*

The following guidelines relate to principal activities in this area which the Armed Forces have encountered:

A. *Possession and Distribution of Printed Materials*

1. A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries. In the case of distribution of publications through other than official outlets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military

mission. When he makes such a determination, the distribution will be prohibited.

2. While the mere possession of unauthorized printed material may not be prohibited, printed material which is prohibited from distribution shall be impounded if the Commander determines that an attempt will be made to distribute.

3. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

B. *Off-Post Gathering Places.* Commanders have the authority to place establishments "off-limits," in accordance with established procedures, when, for example, the activities taking place there, including counselling members to refuse to perform duty or to desert, involve acts with a significant adverse effect on members' health, morale, or welfare.

C. *Servicemen's Organizations.* Commanders are not authorized to recognize or to bargain with a so-called "servicemen's union."

D. *Publication of "Underground Newspapers."* Personal writing for publication may not be pursued during duty hours, or accomplished by the use of Government or non-appropriated fund property. While publication of "underground newspapers" by military personnel off-post, on their own time and with their own money and equipment, is not prohibited, if such a publication con-

tains language the utterance of which is punishable under Federal law, those involved in the printing, publication, or distribution may be disciplined for such infractions.

E. *On-Post Demonstrations and Similar Activities.* The Commander of a military installation shall prohibit any demonstration or activity on the installation which could result in interference with or prevention of orderly accomplishment of the mission of the installation, or present a clear danger to loyalty, discipline, or morale of the troops. It is a crime for any person to enter a military reservation for any purpose prohibited by law or lawful regulations, or for any person to enter or re-enter an installation after having been barred by order of the Commander (18 U.S.C. 1382).

F. *Off-Post Demonstrations by Members.* Members of the Armed Forces are prohibited from participating in off-post demonstrations when they are on duty, or in a foreign country, or when their activities constitute a breach of law and order, or when violence is likely to result, or when they are in uniform in violation of DoD Directive 1334.1 (reference (e)).

G. *Grievances.* The right of members to complain and request redress of grievances against actions of their commanders is protected by Article 138 of the Uniform Code of Military Justice. In addition, a member may petition or present any grievance to any member of Congress (10 U.S.C. 1034). An open door policy for complaints is a

basic principle of good leadership, and Commanders should personally assure themselves that adequate procedures exist for identifying valid complaints and taking corrective action.

IV. *EFFECTIVE DATE AND IMPLEMENTATION*

This Directive is effective immediately. Two (2) copies of implementing regulations shall be forwarded to the Assistant Secretary of Defense (Manpower and Reserve Affairs) within ninety (90) days.

MELVIN A. LAIRD
Secretary of Defense

Enclosure—1

Constitutional and Statutory Provisions

Army Guidance on Dissent

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
Washington, D.C. 20310

28 May 1969

AGAM-P (M) (27 May 69) DCSPER-SARD
SUBJECT: Guidance on Dissent

SEE DISTRIBUTION

1. In the past few weeks there have been press reports suggesting a growth in dissent among military personnel. Questions have been raised concerning the proper treatment of manifestations of soldier dissent when they occur. The purpose of this letter is to provide general guidance on this matter. Specific dissent problems can, of course, be resolved only on the basis of the particular facts of the situation and in accordance with provisions of applicable Army regulations.

2. It is important to recognize that the question of "soldier dissent" is linked with the Constitutional right of free speech and that the Army's reaction to such dissent will—quite properly——continue to receive much attention in the news media. Any action taken at any level may therefore reflect—either favorably or adversely—on the image and standing of the Army with the American public. Many cases involve difficult legal questions, requiring careful development of the factual situation and application of various constitutional, statutory, and regu-

latory provisions (See Appendix A). Consequently, commanders should consult with their Staff Judge Advocates and may in appropriate cases confer with higher authority before initiating any disciplinary or administrative action in response to manifestations of dissent. The maintenance of good order and discipline and the performance of military missions remains, of course, the responsibility of commanders.

3. "Dissent," in the literal sense of disagreement with policies of the Government, is a right of every citizen. In our system of Government, we do not ask that every citizen or every soldier agree with every policy of the Government. Indeed, the First Amendment to the Constitution requires that one be permitted to believe what he will. Nevertheless, the Government and our citizens are entitled to expect that, regardless of disagreement, every citizen and every soldier will obey the law of the land.

4. The right to express opinions on matters of public and personal concern is secured to soldier and civilian alike by the Constitution and laws of the United States. This right, however, is not absolute for either soldier or civilian. Other functions and interests of the Government and the public, *which are also sanctioned and protected by the Constitution, and are also important to a free, democratic and lawful society,* may require reasonable limitations on the exercise of the right of expression in certain circumstances. In particular, the interest of the Government and the public in the maintenance of an effective and disciplined Army for the purpose of National defense justifies certain restraints upon the activities of military personnel which need not be imposed on similar activities by civilians.

5. The following general guidelines are provided to cover some of the manifestations of dissent which the Army has encountered.

a. *Possession and distribution of political materials.*

(1) In the case of publications distributed through official outlets such as Post Exchanges and Post Libraries, a commander is authorized to delay distribution of a specific issue of a publication in accordance with the provisions of para. 5-5 of AR 210-10. Concurrently with the delay, a commander must submit a report to the Department of the Army, ATTN: CINFO. A commander may delay distribution only if he determines that the specific publication presents a clear danger to the loyalty, discipline, or morale of his troops.

(2) In the case of distribution of publications through other than official outlets, a commander may require that prior approval be obtained for any distribution on post. Distribution without prior approval may be prohibited. A commander's denial of authority to distribute a publication on post is subject to the procedures of para. 5-5, AR 210-10, discussed above.

(3) A commander may not prevent distribution of a publication simply because he does not like its contents. All denials of permission for distribution must be in accordance with the provisions of para. 5-5, AR 210-10. For example, a commander may prohibit distribution of publications which are obscene or otherwise unlawful (e.g., counselling disloyalty, mutiny, or refusal of duty). A commander may also prohibit distribution if the manner of accomplishing the distribution materially interferes with the accomplishment of a military mission (e.g., in-

terference with training or troop formation). In any event, a commander must have cogent reasons, with supporting evidence, for any denial of distribution privileges. The fact that a publication is critical—even unfairly critical—of government policies or officials is not in itself, a grounds for denial.

(4) Mere possession of a publication may not be prohibited; however, possession of an unauthorized publication coupled with an attempt to distribute in violation of post regulations may constitute an offense. Accordingly, cases involving the possession of several copies of an unauthorized publication or other circumstances indicating an intent to distribute should be investigated.

b. *Coffee Houses.*

The Army should not use its off-limits power to restrict soldiers in the exercise of their Constitutional rights of freedom of speech and freedom of association by barring attendance at coffee houses, unless it can be shown, for example, that activities taking place in the coffee houses include counselling soldiers to refuse to perform duty or to desert, or otherwise involve illegal acts with a significant adverse effect on soldier health, morale or welfare. In such circumstances, commanders have the authority to place such establishments "off limits" in accordance with the standards and procedures of AR 15-3. As indicated, such action should be taken only on the basis of cogent reasons, supported by evidence.

c. *"Servicemen's Union."*

Commanders are not authorized to recognize or to bargain with a "servicemen's union." In view of the con-

stitutional right to freedom of association, it is unlikely that mere membership in a "servicemen's union" can constitutionally be prohibited, and current regulations do not prohibit such membership. However, specific actions by individual members of a "servicemen's union" which in themselves constitute offenses under the Uniform Code of Military Justice or Army regulations may be dealt with appropriately. Collective or individual refusals to obey orders are one example of conduct which may constitute an offense under the Uniform Code.

d. *Publication of "Underground Newspapers."*

Army regulations provide that personal literary efforts may not be pursued during duty hours or accomplished by the use of Army property. However, the publication of "underground newspapers" by soldiers off-post, on their own time, and with their own money and equipment is generally protected under the First Amendment's guarantees of freedom of speech and freedom of the press. Unless such a newspaper contains language, the utterance of which is punishable under Federal law (e.g., 10 U.S.C. Sec. 2387 or the Uniform Code of Military Justice), authors of an "underground newspaper" may not be disciplined for mere publication. Distribution of such newspapers on post is governed by para. 5-5, AR 210-10, discussed in para. 5a above.

e. *On-Post Demonstrations by Civilians.*

A commander may legally bar individuals from entry on a military reservation for any purpose prohibited by law or lawful regulation, and it is a crime for any person who has been removed and barred from a post by order

of the commander to re-enter. However, a specific request for a permit to conduct an on-post demonstration in an area to which the public has generally been granted access should not be denied on an arbitrary basis. Such a permit may be denied on a reasonable basis such as a showing that the demonstration may result in a clear interference with or prevention of orderly accomplishment of the mission of the post, or present a clear danger to loyalty, discipline, and morale of the troops.

f. *On-Post Demonstrations by Soldiers.*

AR 600-20 and 600-21 prohibit all on-post demonstrations by members of the Army. The validity of these provisions is currently being litigated. Commanders will be advised of the results of this litigation.

g. *Off-Post Demonstrations by Soldiers.*

AR 600-20 and 600-21 prohibit members of the Army from participating in off-post demonstrations when they are in uniform, or on duty, or in a foreign country, or when their activities constitute a breach of law and order, or when violence is likely to result.

h. *Grievances.*

The right of members to complain and request redress of grievances against actions of their superiors is protected by the Inspector General system (AR 20-1) and Article 138, UCMJ. In addition, a soldier may petition or present any grievance to any member of Congress (10 U.S.C. Sec. 1034). An open door policy for complaints is a basic principle of good leadership, and commanders should personally assure themselves that adequate procedures exist for identifying

valid complaints and taking corrective action. Complaining personnel must not be treated as "enemies of the system." Even when complaints are unfounded, the fact that one was made may signal a misunderstanding, or a lack of communication, which should be corrected. In any system as large as the Army, it is inevitable that situations will occur giving rise to valid complaints, and over the years such complaints have helped to make the Army stronger while assuring compliance with proper policies and procedures.

6. It is the policy of the Department of the Army to safeguard the service member's right of expression to the maximum extent possible, and to impose only such minimum restraints as are necessary to enable the Army to perform its mission, in the interest of National defense. The statutes and regulations referred to above (as well as some other provisions of law and regulations) are concerned with these permissible restraints and authorize a commander to impose restrictions on the military member's right of expression and dissent, under certain circumstances. However, in applying any such statutes and regulations in particular situations, it is important to remember that freedom of expression is a fundamental right secured by the Constitution. Furthermore, it is important to remember that the Commander's responsibility is for the good order, loyalty and discipline of all his men. Severe disciplinary action in response to a relatively insignificant manifestation of dissent can have a counter productive effect on other members of the Command, because the reaction appears out of proportion to the threat which the dissent represents. Thus, rather than serving as a deterrent, such disproportionate actions may stimulate further

breaches of discipline. On the other hand, no Commander should be indifferent to conduct which, if allowed to proceed unchecked, would destroy the effectiveness of his unit. In the final analysis no regulations or guidelines are an adequate substitute for the calm and prudent judgment of the responsible commander.

7. The mission of the Army is to execute faithfully, as ordered, policies and programs established in accordance with law by duly elected and appointed Government officials. Unquestionably, the vast majority of service members are prepared to do what is required of them to perform that mission, whether or not they agree in every instance with the policies the mission reflects.

BY ORDER OF THE SECRETARY OF THE ARMY:

KENNETH G. WICKHAM
Major General, USA
The Adjutant General

1 Incl
App A

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-145

DAVID NOLAND, ET AL., PETITIONERS

v.

WILLIAM R. DESOBRY, COMMANDING GENERAL, UNITED STATES ARMY ARMOR CENTER, FORT KNOX, KENTUCKY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not reported. The order of the district court granting partial summary judgment (Pet. App. 3a) and the final order and judgment of the district court (Pet. App. 7a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1972. The petition for a writ of certiorari was filed on July 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Army Regulation 210-10 (Pet. App. 14a), permitting the Commanding Officer of a military installation to deny permission to distribute publications on a military base if in his judgment the publications present "a clear danger to military loyalty, discipline, or morale," is unconstitutional.

STATEMENT

1. Petitioners, enlisted servicemen stationed at the Army Armor Center, Fort Knox, Kentucky, publish and distribute off-base an underground newspaper, *In Formation*. In April, 1970, after first distributing two issues on the base in violation of Army regulations, petitioners formally applied to the base commander for permission to distribute *In Formation* in the company areas on the base (App. 36, 54, 93; Supp. A. 6).[1] Acting under Army Regulation 210-10, ¶ 5-5c, and a local implementing regulation (Pet. App. 14a-18a), the base commander denied the request in May, 1970 (Pet. 4; Pet. App. 4a).

---

[1] The references are to the Appendix and Supplemental Appendix filed in the court of appeals.

The base commander then forwarded the request for distribution, and an explanation of his reasons for denying it, to the Department of the Army, as required by AR 210-10, ¶ 5-5d (Pet. App. 9a, 15a). Permission to distribute issue number two had been denied because the base commander determined that "the publication's advocacy of the demands of the American Servicemen's Union [ASU] constituted a clear danger to the military loyalty, discipline, and morale of his command" (Pet. App. 4a). These demands, prominently displayed in issue number two of *In Formation*, included "An end to saluting and sir-ing officers—lets get off our knees," "Election of officers by vote of the men," and "The right to disobey illegal orders—like orders to go and fight in an illegal war in Vietnam" (App. 73). The commanding officer concluded that "no military installation could continue to function if these goals were achieved" (App. 55). Specifically, the base commander pointed out that because the principal responsibility of the Army Armor Center was to train new enlistees for service in Vietnam, the advocacy of "programs aimed at modifying the Army's organizational structure * * * at this point in their training would, in my opinion, impair the morale and discipline of these trainees, limiting or destroying the value of subsequent training" (App. 55-56).[2]

---

[2] The base commander also concluded that "any attempt to publicize" these demands would be met by a hostile and possibly violent reaction from "a significant number of the personnel" assigned to the Armor Center, especially non-commisssioned officers (App. 56, 101).

The Department of the Army sustained the denial of distribution as to issue number two, but permitted the distribution of issue number one (Pet. App. 9a). The base commander was informed that he was authorized "to place reasonable restrictions on the time, place and method of distribution to insure that the amount of distribution does not [materially] interfere with the accomplishment of the military mission" (App. 81). Petitioners were then informed that they could distribute issue number one on a date of their choosing, at four specified locations, but that personal solicitation of trainees would not be permitted (App. 38-39).[3] The decision to limit distribution to one day was "in no way questioned" by petitioners (App. 101).

2. On October 20, 1970, prior to final action by the Department of the Army on their request, petitioners commenced an action against their Commanding Officer seeking judicial review of his decision, made pursuant to Army Regulation 210-10, to bar distribution of issues number one and two of *In Formation*. The complaint also challenged the validity of Army Regulation 210-10, ¶ 5.5. (On the basis of the Army's subsequent approval, issue number 1 was later distributed on the base.)

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[3] Issue number one was distributed on December 12, 1970 (Pet. App. 10a). On March 1, 1971, petitioners requested permission to distribute issue number five of *In Formation* on the base. The base commander recommended that distribution be approved, and on March 30, 1971, the Army authorized distribution of issue number five (Pet. App. 10a).

On April 13, 1971, the district court granted partial summary judgment to the government. The court upheld the constitutionality of Army Regulation 210-10, ¶ 5-5 under *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981. After personally "examin[ing] the publication in question" (issue number two), the district court held that the base commander had not acted unreasonably or unconstitutionally in barring its distribution. The court found that "advocacy of such ASU demands as the right to elect officers by popular vote and the right to disobey orders to serve in Vietnam are totally incompatible with the maintenance of military loyalty, discipline, and morale. As to such we do not believe reasonable men could differ" (Pet. App. 4a-5a).

The court subsequently held an evidentiary hearing on petitioners' remaining contentions. It found that the restrictions imposed on distribution of issue number one were reasonable,[4] that no unreasonable

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[4] Petitioners' veiled suggestions here of harassment of their activities in distributing issue number one (Pet. 5-6) are based entirely upon petitioner Noland's direct testimony at the trial. The district court, which heard Noland testify, expressed serious reservations as to his credibility (Pet. App. 11a), and commented following the trial that Noland had, on at least one occasion, attempted "to create an impression of arbitrariness and disregard of his rights on the part of the military which he admits did not happen." (App. 32). Petitioners' allegations that "military police [were] stationed at the paper's distribution points," attempting to identify servicemen taking copies (Pet. 6), is likewise supported only by Noland's testimony that he had heard about such activity a week after distribution from unidentified sources. Noland

delay took place in responding to the distribution requests since the publications dealt with general issues, not "time is of the essence" news, and that petitioners' claims that they were entitled to a hearing before distribution was banned were without merit (Pet. App. 7a-13a). The court of appeals affirmed, one judge dissenting, on the findings, conclusions and opinion of the district court (Pet. App. 1a-2a).

ARGUMENT

1. The constitutionality of Army Regulation 210-10, ¶ 5-5, which permits a commanding officer to bar distribution on a military base of publications whose distribution "presents a clear danger to the loyalty, discipline, or morale of troops at his installation," has been repeatedly sustained against challenges similar to those raised by petitioner, here. See *Schneider* v. *Laird*, 453 F. 2d 345 (C.A. 10), certiorari denied, No. 71-1271 (June 12, 1972); *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981; *Yahr* v. *Resor*, 431 F. 2d 690 (C.A. 4), certiorari denied, 401 U.S. 982.[5]

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did not personally observe anyone stationed at the distribution points. Counsel objected to such testimony as hearsay and the district court agreed (App. 128).

[5] There is no conflict among the courts of appeals. *Kiiskila* v. *Nichols*, 433 F. 2d 745 (C.A. 7), upon which petitioners rely, involved the exclusion of a civilian employee from a naval base because she had distributed anti-war literature near the base. The case did not involve the validity of Army Regulation 210-10, ¶ 5.5.

Flower v. *United States*, No. 71-1180, decided June 12, 1972, upon which petitioners here rely, does not hold to the contrary. That case, decided summarily on the same day the Court denied certiorari in *Schneider*, *supra*, involved the criminal conviction of a civilian under 18 U.S.C. 1382 for violating a military order barring him from entering a military post. At the time of his arrest he was quietly distributing leaflets, announcing an off-base meeting on the Vietnam war, on what the Court viewed as a major, heavily used, "public street" that happened to traverse the Fort Sam Houston military reservation. The Court concluded that "under conditions like those" in that case Section 1382 of the Federal Criminal Code could not constitutionally be applied to punish a civilian for pamphleteering on a "public street."

The instant case, however, like *Schneider*, involves the scope of permissible administrative regulation by military authorities of the distribution of disruptive publications by military personnel to other military personnel in military areas of an army base. Moreover, while Fort Knox, like Fort Sam Houston, is an open fort, and while the public is not physically barred from the company areas, those areas and others on the fort cannot be equated with the public thoroughfare in *Flower* which was "an important traffic artery used freely by buses, taxi cabs, and other public transportation facilities," and the sidewalks of which were "used extensively at all hours of the day [and night] by civilians as well as military personnel". *Flower* v. *United States*, *supra*,

quoting *United States* v. *Flower*, 452 F. 2d 80, 90 (C.A. 5), dissenting opinion. See also *Lloyd Corp.* v. *Tanner*, No. 71-492, decided June 22, 1972.

2. Petitioners' attack upon AR 210-10 and the Fort Knox implementing regulation (Pet. App. 14a-18a) as "overbroad" is without merit and is fully answered by the opinion in *Dash* v. *Commanding General*, 307 F. Supp. 849, 845-855 (D. S.C.), affirmed on the district court opinion, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981. There Judge Russell held:

> The regulation must be read * * * in conjunction with the opinion of the Judge Advocate instructing authoritatively the Post Commander in the exercise of his powers under AR 210-10, paragraph 5-5e. By these instructions, the Post Commander is required to make specific findings in support of any restriction imposed by him under the Regulation. Specifically, he is advised against any denial based on "good taste" or "in the best interests of the command" and is instructed that he may delay distribution of a publication "only if he determines that the specific publication presents a clear danger to the loyalty, discipline, or morale of his troops." He is commanded that he "may not prevent distribution of a publication simply because he does not like its contents" and "The fact that a publication is critical—even unfairly critical—of Government policies or officials is not in itself, a ground for denial." The constitutionality of the regulation must be determined on the regulation as construed and defined in these instructions issued by the Judge Advocate, controlling the applica-

> tion by the Post Commander of the regulation. See the concurring opinion of Justices Black and Douglas in Gregory v. City of Chicago (1969) 394 U.S. 111, 113, 89 S.Ct. 946, 22 L.Ed.2d 134, and concurring opinion of Justice Harlan in Shuttlesworth v. City of Birmingham (1969) 394 U.S. 147, at p. 159, 89 S.Ct. 935, 22 L.Ed.2d 162. * * *

The court in *Dash* held that the Regulation (and a local implementing regulation), as limited by these instructions (Pet. App. 24a), was not impermissibly broad and indefinite. That decision is correct and equally applicable here. Cf. *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886; *Weissman* v. *United States*, 387 F. 2d 271, 273-274 (C.A. 10). A reading of AR 210-10 ¶ 5-5, and the implementing regulation (Pet. App. 14a-18a), in context with the Army Adjutant General's instructions and definitions (Pet. App. 24a-32a), and with the Defense Department's directive (Pet. App. 19a-23a), shows the Army has established a system carefully designed to protect special military needs and responsibilities with a minimal impact on constitutionally protected interests.

3. Petitioners, relying upon *Blount* v. *Rizzi*, 400 U.S. 410, 417, and *Freedman* v. *Maryland*, 380 U.S. 51, argue (Pet. 13) that "the regulatory requirements and time limitations which a censorship regime must afford" are lacking in Army Regulation 210-10, ¶ 5-5.[6] The cases cited by the petitioners in-

[6] Petitioner's major objection appears to be that the regulation fails to guarantee a prompt determination of an application for permission to distribute material. The regulation

volved censorship of allegedly obscene materials intended for general dissemination to the public. The Court in that context held (*Blount* v. *Rizzi*, 400 U.S. at 417):

> [T]o avoid constitutional infirmity a scheme of administrative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require "prompt judicial review" —a final judicial determination on the merits within a specified, brief period—to prevent the administrative decision of the censor from achieving an effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination. * * *

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does, however, provide that concurrent with the imposition of the delay in distribution authorized by Army Regulation 210-10, ¶ 5-5, the commander will inform the next major commander and Headquarters, Department of the Army, and request approval to prohibit distribution of the publication. Paragraph 5-5(d) of the regulations provides that "[t]elephonic communication will be used in each instance" and that if the document at issue is unlikely to be available it should be dispatched "by the fastest available means". The Regulation is thus not insensitive to the desirability of prompt decision. While the initial decision on issues one and two did take an extended period of time, there is nothing in the record to indicate that such delays are commonplace. Indeed, the district court found that the delay occurred because the administrative procedures were new and the request novel (Pet. App. 12a-13a). Permission to distribute issue number five was granted within 30 days of submission of the application. The court also noted that there was no particular damage resulting from the delay because the publications involved ideological submissions, not "time of the essence news" (Pet. App. 12a).

The instant case, however, involves only a limitation on the distribution of materials within the confines of a military installation. Petitioners were not prohibited by Army Regulation 210-10, ¶ 5.5, from printing the materials on their own time and at their own expense and distributing them outside the confines of the installation. There is a significant distinction between action undertaken by the government in regulating the armed forces and the operations of military installations, on the one hand, and action restricting the general dissemination of materials by private citizens to the public. As the Court held in an analogous case (*Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896):

> [T]he governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment. * * *

The imposition here of the standards set out in *Blount* v. *Rizzi*, 400 U.S. 410, 417, and *Freedman* v. *Maryland*, 380 U.S. 51, would place an unwarranted and unjustified burden on the ability of a military commander to maintain order and discipline on the installation. Petitioners are unable to cite any case which goes so far.[7]

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[7] *Eisner* v. *Stamford Board of Education*, 440 F. 2d 803, 807 (C.A. 2), cited by petitioners (Pet. 13), involved the dissemination of a newspaper in a school, an institution which

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

E. GREY LEWIS,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
WILLIAM D. APPLER,
Attorneys.

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is " 'a market place of ideas' " and in which "exposure to * * * robust exchange of ideas" plays an essential role. *Tinker* v. *Des Moines School District*, 393 U.S. 503, 512. But even there the court of appeals declined to apply all of the limitations which *Freedman* v. *Maryland*, *supra*, and *Blount* v. *Rizzi*, *supra*, held were essential in cases involving materials intended for general public distribution (440 F. 2d at 810).

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